IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 15TH NOVEMBER 2007 / 24TH KARTHIKA 1929

SA.No. 426 of 1993(A)

AS.102/1986 OF SUB COURT, TIRUR
OS.83/1981 OF MUNSIFF MAGISTRATE COURT,PONNANI
.....

APPELLANT/5TH RESPONDENT & 5TH DEFENDANT

PULIKKAL VELAYUDHAN NAIR,
S/O. MEENAKSHIAMMA, KUTTUPPALA AMSOM,
PURUMUNDAKKOD DESOM, PONNAI TALUK,
MALAPPURAM DIST. REP. BY SRI. NARAYANAN NAIR,
POWER OF ATTORNEY HOLDER OF VELAYUDHAN NAIR.

BY ADV. SRI.K.RAMAKUMAR

RESPONDENTS/ APPELLANT & RESPONDENTS 2,3 AND 6 YO 13 IN A.S. & PLAINTIFF & DEFENDANTS 1 TO 4 & 6 YO 9 IN O.S:

***1. PULIKKAL VELAYUDHAN NAIR, S/O. SREEDEVI AMMA, KUTTIPPALA AMSOM, PURAMUNDAKKOD DESOM, PONNAI TALUK, MALAPPURAM DIST.**
(DIED, LEGAL REPRESENTATIVES IMPLEADED).

2. PULIKKAL KRISHNAN NAIR, S/O. MEENAKSHIAMMA, -DO-

3. PULIKKAL NARAYANAN NAIR, S/O. MEENAKSHI AMMA, -DO-

4. RADHA AMMA, D/O. MEENAKSHI AMMA, -DO-

5. MANIKANDAN, AGED ABOUT 13 YRS, MINOR, REP. BY HIS MOTHER 4TH RESPONDENT.

6. LATHA, AGED 11 YRS, (MINOR), REP. BY HER MOTHER 4TH RESPONDENT.

7. ULLATTUVALAPPIL MOHAMMED, S/O. MAMMU, KUTTUPPALA AMSOM, PURAMUNDAKKOD DESOM, PONNANI TALUK, MALAPPURAM DIST.

**8. KARUNGATT VIJAYALAKSHMI AMMA, D/O. AMMUMMA,
KUTTUPPALA AMSOM, PURAMUNDAKKOD DESOM,
PONNAI TALUK, MALAPPURAM DIST.**

**9. SASIREKHA, AGED 16 YRS, (MINOR),
REP. BY HER MOTHER 8TH RESPONDENT.**

**10. JAYAPRABHA, AGED 15 YRS, (MINOR),
REP. BY HIS MOTHER 8TH RESPONDENT.**

**11. JAYASANKAR, AGED 13 YRS, (MINOR),
REP. BY HIS MOTHER 8TH RESPONDENT.**

12. P.JANAKI AMMA, AGED ABOUT 62 YRS , *(WITHDRAN FROM CONTEST AND RECORDED)
**W/O. LATE PULIKKAL VELAYUDHAN NAIR, PANEKKAT HOUSE,
P.O. MUDUR, VIA VATTAMKULAM, MALAPPURAM DIST.
KERALA – 679 578.**

**13. E.P. VENUGOPAL, AGED 39 YRS,
S/O. LATE VELAYUDHAN NAIR, -DO-**

14. VASUDEVAN, AGED 36 YRS, S/O. -DO-

15. MANIKANTAN AGED 33 YRS, -DO-

16. REMANI AGED 29 YRS, D/O. -DO-

**** ADDITIONAL RESPONDENTS 12 TO 16 ARE IMPLEADED AS THE LEGAL REPRESENTATIVES OF DECEASED IST RESPONDENT AS PER ORDER DATED 08/10/2002 IN CMP NO. 858/2002.***

**** IT IS RECORDED THAT ADDITIONAL RESPONDENTS 12 TO 16 WHO ARE THE LEGAL REPRESENTATIVES OF CONTESTING FIRST RESPONDENT HAVE NO CONTENTIONS IN THE APPEAL AND HAVE WITHDRAWN FROM THE CONTEST AS PER ORDER DATED 24/08/2004 IN IA NO. 1651/2004.***

**BY ADV. SRI.K.RAMACHANDRAN -- R13 TO 15
SMT.PREETHY KARUNAKARAN
R1 BY ADV. SMT. JAYASREE S.**

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 15/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP NO. 650/1995 IN S.A. NO. 426/1993 A.

DISMISSED

15/11/2007. SD/- M.SASIDHARAN NAMBIAR, JUDGE.

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M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 426 OF 1993

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Dated this the 15th day of November, 2007

JUDGMENT

Fifth defendant in O.S.83/1981 on the file of Munsiff Court,Ponnani is the appellant. First respondent is the plaintiff and other respondents other defendants in the suit. First respondent instituted the suit seeking partition and separation of his share. Plaint schedule property admittedly originally belonged to Kunhamma Amma under Ext.A1 Verumpattam assignment deed dated 7.8.1950. Kunhamma Amma admittedly died prior to the commencement of Madras Marumakkathaya Act, 1932. On the death of Kunhamma Amma, her right devolved on her three daughters first defendant, Narayani Amma and Sreedevi Amma. Narayani Amma admittedly died issueless. First respondent is the only son of Sreedevi Amma. Defendants 2 to 11 are the children of Paru Amma. On the death of first respondent respondents 12 to 16 were impleaded as

his legal heirs in the appeal. First respondent contended that plaint schedule property devolved on plaintiff and defendants as Sreedevi Amma died issuless and first defendant is the sole daughter of Paru Amma and plaintiff the sole son of Sreedevi Amma and each of them is entitled to one share each. First respondent sought his share with share of profits. Defendants 4 and 5 filed a written statement contending that plaint schedule property belonged to thavazhi of deceased Kunhamma Amma and as she died prior to the commencement of Madras Marumakkathaya Act, her share devolved on the female heirs in the female line and the children of 6th defendant are not impleaded and Paru Amma executed Ext.B1 mortgage in 1933 in favour of Krishnan Nair and subsequently created Ext.B2 mortgage in favour of Velayudhan Nair and Ext.B2 is for a period of six years and Velayudhan Nair the mortgagee under Ext.B2 redeemed Ext.B1 mortgage and without redemption of Ext.B2 mortgage suit for partition is not maintainable. It was contended

that on the death of Velayudhan Nair his rights devolved on defendants 1 to 8 and they divided the property as per partition deed on 29.4.1981 and therefore plaint schedule property is not available for partition.

2. Learned Munsiff on the evidence of PW1, DW1 and Exts.A1 to A3 and Exts.B1 to B8 dismissed the suit holding that without redemption of Ext.B2 mortgage plaint schedule property is not available for partition. First respondent challenged the decree and judgment before Sub Court, Tirur in A.S.102/1986. Learned Sub Judge on reappreciation of evidence found that though under Ext.B2 plaint schedule property was mortgaged to Velayudhan Nair, on his death, it devolved on his widow and children who are defendants 1 to 3 and under Ext.B2 first defendant is the mortgagor and the mortgagors also obtained the mortgage right under Ext.B2, being the legal heir of mortgagee deceased Velayudhan Nair and therefore the mortgage stand extinguished and no suit for redemption is warranted. Learned

Sub Judge found that plaint schedule property is available for partition. It was found that on the death of Kunhamma Amma, it devolved on daughters Paru Amma, Narayani Amma and Sreedevi Amma and also on their children and hence first respondent is entitled to 1/9 share. A preliminary decree was passed. It is challenged in the appeal.

3. After the death of first respondent, and respondents 12 to 16 were impleaded as his legal heirs, they filed I.A.1651/2004 an application supported by the affidavit of respondent No.13 to the effect that after the death of first respondent mediators intervened and consequently the legal heirs of deceased first respondent agreed that not claim any right in respect of the property involved in the second appeal and therefore they are not contesting the appeal.

4. Learned counsel appearing for appellant was heard. Though notice in the appeal was issued no substantial question of law was formulated.

5. The only contention raised in the second

appeal is that a suit for partition without seeking redemption of Ext.B2 mortgage is not sustainable. The argument is that under Ext.B2 plaint schedule property was mortgaged to Velayudhan Nair and since the date of Ext.B2 plaint schedule property has been in the possession of Velayudhan Nair as a mortgagee and unless that mortgage is redeemed and brought back to the possession of thavazhi, plaint schedule property cannot be divided.

6. It is admitted case that the property was acquired by Kunhamma Amma under Ext.A1 prior to the coming into force of Madras Marumakkathaya Act. Therefore on the death of Kunhamma Amma it admittedly devolved on her three daughters. But Kunhamma Amma died after coming into force of Madras Marumakkathaya Act. Therefore on the death of Kunhamma Amma plaint schedule property devolved on the remaining members of her thavazhi namely, Paru Amma, Narayani Amma and Sreedevi Amma and their children in the female descendants. Narayani Amma died issuless and plaintiff and

defendants were the only members of the thavazhi. First appellate court found that there are nine members of thavazhi and each of them is entitled to one share. Learned counsel appearing for appellant did not dispute the quantum of share as fixed. The challenge was only against the availability of the plaint schedule property for partition and that too on the ground that Ext.B2 mortgage was not redeemed and without redemption the suit is not maintainable.

7. Velayudhan Nair the mortgagee under Ext.B2 is no more. First defendant is the widow and other defendants the children of Velayudhan Nair. Therefore on the death of Velayudhan Nair, defendants who are admittedly having right of equity of redemption obtained the mortgage right as legal heir of the mortgagee Velayudhan Nair. Therefore the right of the mortgagee under Ext.B2 also vested with the mortgagors. Hence there is an extinguishment of the mortgage by merger of the mortgage right and right of the mortgagee as

rightly found by first appellate court. Therefore there is no necessity for seeking redemption of Ext.B2 mortgage. Therefore I find no reason to interfere with the decree granted by the trial court.

The appeal is therefore dismissed recording the statement of respondents 12 to 16 the legal heirs of deceased plaintiff that they are not claiming share in the plaint schedule property in view of the settlement between the parties.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A.NO.426 /1993

JUDGMENT

15th November,2007